

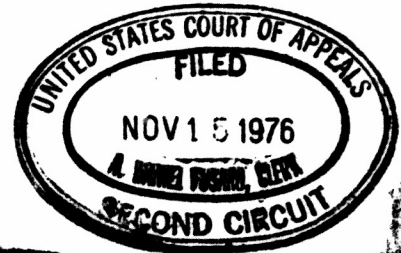
***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7438

In The
UNITED STATES COURT OF APPEALS
For the Second Circuit



FEDERAL DEPOSIT INSURANCE COMPANY,
as Receiver of Franklin National Bank,

Plaintiff-Appellee,

-against-

JEAN M. GRELLA, LAWRENCE LEVER and
LEVER HOLDING CORP.,

Defendants,

JEAN M. GRELLA,

Defendant-Appellant

BRIEF of Defendants LAWRENCE
LEVER and LEVER HOLDING CORP.

WOLFF & DIAMOND
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The Receiver had right to sue, there was a ripe controversy and the Court had subject matter jurisdiction	2
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The Court below was correct in granting the Summary Judgment in favor of the FDIC	3
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For the reasons stated above, the decision and judgment of the District Court should be affirmed with costs	5
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UNITED STATES COURT OF APPEALS

For the Second Circuit

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FEDERAL DEPOSIT INSURANCE COMPANY. :
as Receiver of Franklin National Bank. :

Plaintiff-Appellee, :

v. :

JEAN M. GRELLA, LAWRENCE LEVER and :
LEVER HOLDING CORP., :

Defendants :

JEAN M. GRELLA, :

Defendant-Appellant :

-----x
Brief of Defendants LAWRENCE LEVER
and LEVER HOLDING CORP.

Introductory Statement

This brief is submitted on behalf of Defendants Lawrence Lever and Lever Holding Corp. The said Defendants supported the Plaintiff's position below but did not join in the motion resulting in the judgment from which this appeal is being taken. Said Defendants reserved their rights to litigate subsidiary issues in the event of the denial of the motion. In view of the foregoing the said Defendants

were not named as Appellees and submit this brief subject to the same reservation as below.

Issues Presented for Review

The Appellant's issues set forth in her brief at page 3 fall into two major categories. Issues numbered "1", "2" and "3" relate to jurisdiction of the Court. Issue "4" relates to the merits of the controversy.

Statement of the Case and Facts

A full and complete statement of the case with which these Defendants concur appears in the decision below which is reprinted at page A80 of the joint appendix. These Defendants agree with the statement of facts set forth therein.

Point I

The Receiver had right to sue, there was a ripe controversy and the Court had subject matter jurisdiction

Grella took the position that Franklin National Bank defaulted under the Ground Lease and was, in fact, the tenant, and remains liable for the payment of rent and damages under the lease. Grella attempted to terminate the lease which, in effect, would create liability on the part of the FDIC for any and all damages for the balance of the

term of the lease which extends for many years.

If Grella was correct, there is a ripe controversy between her and the FDIC as Receiver concerning which the FDIC has standing and the Court has subject matter jurisdiction.

Even if Grella is incorrect and the lease was not in default by virtue of the events which transpired, the claim asserted by Grella is sufficient to create a ripe controversy, the resolution of which is important to the FDIC and which claim gives the FDIC the standing to sue, creates a controversy and over which the Court has subject matter jurisdiction.

Point II

The Court below was correct in granting the Summary Judgment in favor of the FDIC

The Appellant raised the issue of the merits of the claim during the proceedings below. There are no new nor different cases nor points of law presented upon this appeal. The Appellant's contention that New York substantive law should apply was also raised in the proceeding below and was discussed in full in the decision of Hon. Orrin G. Judd. In fact, New York substantive law was applied. That law

requires strict construction of "forfeiture clauses". A reading of paragraph "10" of the lease and the application of that paragraph to the instant facts indicates that none of the events specified in the forfeiture clause ever took place.

The Appellant makes much of the fact that she was "an unsophisticated housewife" (page 33 of Appellant's brief) and that the lease was drawn by Franklin's attorney. The Appellant attempts to convey the impression that she was under some disability or should be entitled to extraordinary sympathy and consideration because she was bound to enter into the lease on onerous terms. This is not true. The binder agreement (A39) provides in paragraphs numbered 7 and 8 that the lease to be executed must contain provisions which are mutually satisfactory to the parties and that in the event such lease was not executed by the bank within the time prescribed, that the Appellant could retain the \$5,000.00 binder consideration. Grella was represented by counsel at the time the binder was executed, during the negotiation of the lease and at the time of the execution of the lease (A84, A96).

Conclusion

For the reasons stated above, the decision and judgment of the District Court should be affirmed with costs.

Respectfully submitted,

Wolff & Diamond

WOLFF & DIAMOND,

Attorneys for Defendants,

LAWRENCE LEVER and

LEVER HOLDING CORP.

Jerrold I. Lupo
JERROLD I. LUPOFF.
of Counsel

STATE OF NEW YORK)
 : SS :
COUNTY OF NASSAU)

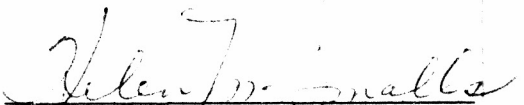
Helen M. Smalls, being sworn, says: I am not a party to this action; I am over 18 years of age; I reside at Syosset, New York.

On November 11, 1976, I served the within Brief upon the following attorneys in this action, at the addresses designated by said attorneys for that purpose:

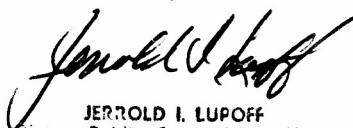
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by depositing a true copy of same enclosed in postpaid, properly addressed wrappers, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


Helen M. Smalls

Sworn to before me
this 11th day of November, 1976.


JERROLD I. LUOFF
Notary Public, State of New York
No. 30-7625275
Commission Expires March 30, 1978